

STATE OF MICHIGAN
COURT OF APPEALS

SHR LIMITED PARTNERSHIP,

Plaintiff/Counter Defendant-
Appellant,

v

MERCURY EXPLORATION COMPANY,
DOMINION RESERVES, INC., and
QUICKSILVER RESOURCES, INC.,

Defendants/Counter Plaintiffs-
Appellees.

UNPUBLISHED
December 6, 2002

No. 232466
Otsego Circuit Court
LC No. 99-008060-CK

Before: Hood, P.J., and Whitbeck, C.J., and O'Connell, J.

PER CURIAM.

Plaintiff appeals as of right an order denying its motion for summary disposition and granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). We affirm in part and remand for further proceedings consistent with this opinion.

This is an oil and gas case. Plaintiff is the owner of mineral rights under lease to defendants. The sole issue on appeal concerns defendants' rights to deduct post-production costs from plaintiff's royalty interests. This is the second time this post-production cost issue has been litigated in a Michigan court between these parties. In 1983, plaintiff's predecessor in interest litigated the same issue with defendants' predecessors in interest.

In *North Michigan Land & Oil Corp v Shell Oil Co* and *Nielson v Shell Oil Co*, consolidated Crawford Circuit Court cases 80-004-292 CZ and 80-004-294, decided December 8, 1983, slip op at 15, 26-27, the court held that defendants' predecessors in interest were entitled to deduct post-production costs from royalty payments. The plaintiffs in the consolidated cases appealed; however, before this Court issued an opinion, the parties agreed to settlements in favor of the plaintiffs. Thus, because these settlements prohibited the defendants from making the deductions, the settlements reached a result opposite from the trial court's original ruling.

The current litigation began when defendants, in contravention of the settlement agreement, began deducting post-production costs from plaintiff's royalty interests. In cross-motions for summary disposition, the parties set forth arguments interpreting the lease contract in their favor and discussing the precedence of the trial court's previous ruling in this matter. In

May 2000, the lower court held in favor of defendants, citing the trial court's 1983 decision, but permitting plaintiff to file an amended complaint. In the amended complaint, plaintiff alleged that defendants committed breach of contract in failing to adhere to the 1984 and 1985 stipulated settlements concerning post-production costs. However, the present parties then stipulated to dismiss the amended complaint, and on January 23, 2001, the lower court entered an order consistent with its May 2000 order. Plaintiff then filed the instant appeal.

At issue in the present case is a contractual provision stating that "[t]he lessee shall pay lessor, as royalty, one-eighth of the proceeds from the sale of the gas, as such, produced from gas wells on leased premises." The trial court held that this language unambiguously entitled defendants to deduct post-production costs from their proceeds when computing plaintiff's royalties. We conclude that the court reached the correct result albeit for the wrong reasons. See *Norris v State Farm Fire & Casualty Co*, 229 Mich App 231, 240; 581 NW2d 746 (1998).

As the trial court acknowledged, this case was previously litigated and resulted in an order that, though appealed, was never overturned. Under these circumstances, it is abundantly clear that we must address the res judicata doctrine. The purposes of res judicata are to relieve parties of the cost and inconvenience of multiple lawsuits, to conserve judicial resources, and to preserve the precedence of previous adjudications. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380; 596 NW2d 153 (1999). Applying the elements of res judicata to this case, first, the previous action was decided on the merits, and a final decision was reached. The fact that the previous litigation ultimately settled after the trial court's final order was issued does not preclude the order's res judicata effect. See *Ditmore v Michalik*, 244 Mich App 569, 576; 625 NW2d 462 (2001) (O'Connell, P.J.).¹ Second, the previous action involved the predecessors in interest of the parties to the instant litigation. See *id.* at 577. Thus, the predecessors are privies of the instant parties and the instant parties are bound by their predecessors' actions. *Id.* at 578, n 2; see also *Wildfong v Fireman's Fund Ins Co*, 181 Mich App 110, 114-115; 448 NW2d 722 (1989); *Howell v Vito's Trucking & Excavating Co*, 386 Mich 37, 43; 191 NW2d 313 (1971).

Third, the over-arching issue in this case – namely, whether post-production costs were deductible from royalties under the terms of the lease agreement – was resolved in the previous litigation. Accordingly, all the elements of res judicata are met. See *Bd of Co Rd Commr's for Co of Eaton v Schultz*, 205 Mich App 371, 375-376; 521 NW2d 847 (1994); see also *Baraga Co v State Tax Comm*, 243 Mich App 452, 455-456; 622 NW2d 109 (2000), rev'd on other grounds 466 Mich 264 (2002). Therefore, the trial court should have concluded that summary disposition was appropriate under MCR 2.116(C)(7) because the parties had previously litigated this matter in *North Michigan*. Though the trial court gave a different explanation for its decision, our

¹ We note that because the stipulated settlements in the previous litigation were not consent judgments, i.e., signed by the circuit court, the settlements themselves do not constitute res judicata in the case at bar. See Black's Law Dictionary (7th ed) (definitions of "agreed [consent] judgment," "settlement," and "stipulation"); *Ditmore*, *supra*, citing *Baraga Co v State Tax Comm*, 243 Mich App 452, 455; 622 NW2d 109 (2000), and *Schwartz v Flint*, 187 Mich App 191, 194; 466 NW2d 357 (1991) (res judicata applies to consent judgments).

conclusion merely provides an alternative ground for affirming. See *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 643; 591 NW2d 393 (1998).

In addition, we note our agreement with the court below that plaintiff may be charged a portion of the severance tax as well as a portion of the privilege fee. The severance tax act, MCL 205.301 *et seq.*, was amended in 1965 to expressly add royalty owners to those producers liable for the tax, MCL 205.312; *Brown v Shell Oil Co*, 128 Mich App 111, 116, 119; 339 NW2d 709 (1983), and royalty owners are subject to the tax regardless whether they are actually engaged in the business of severing oil and gas from the soil. See *Brown, supra* at 119; *Lawnichak v Treasury Dep't*, 214 Mich App 618, 622-623; 543 NW2d 359 (1995). Because the supervisor of wells act incorporated the provisions of the severance tax act, see MCL 324.61524, it follows that plaintiff may also properly be charged a portion of the privilege fee assessed under the supervisor of wells act.

Finally, we note that an important aspect of this case is that the lease was drafted in 1968. Currently, oil and gas producers and lessors use “division orders” to indicate who receives royalties and in what amount. See *Condra v Quinoco Petroleum, Inc.*, 954 SW2d 68, 70 (Tex Civ App 1997). “A division order is ‘[a] contract of sale to the purchaser of oil or gas. The order directs the purchaser to make payment for the value of the products taken in the proportions set out in the division order.’ Williams & Meyers, Manual of Oil and Gas Terms § 258 (1985).” *Anadarko Petroleum Co v Venable*, 312 Ark 330, 338; 850 SW2d 302 (1993). A division order is intended to assure that the purchaser pays only those parties who are entitled to payment. *Blausey v Stein*, 61 Ohio St 2d 264, 267; 400 NE2d 408 (1980). “By signing the division order, the lessor is simply verifying that he has a right to royalty payments.” *Id.*

The record in this case does not indicate whether the parties proposed or signed a division order. Thus, we remand this case for a determination of whether the parties proposed or signed a division order governing the disputed issues. If the parties did sign a division order, they are bound by its terms under ordinary contract principles. See *Terrien v Zwit*, 467 Mich 56, 71-72; 648 NW2d 602 (2002) (theory of freedom of contract binds parties to plain language of contract).

At oral argument in this case, plaintiff asserted that the original trial court’s decision did not address all post-production costs the present defendants seek to deduct from plaintiff’s royalties. In *North Michigan, supra*, slip op 5-10, 15, 26-27, the court only held that the parties must “apportion the costs of dehydration, treatment, . . . compression,” and marketing costs between them. The disputed post-production costs raised in the court below and argued on appeal are: treatment for carbon dioxide removal; transportation to the point of sale; severance taxes; fuel loop costs; “miscellaneous charges” (Plaintiff’s Complaint, p 5); privilege fees; saltwater disposal and related operations; and costs incurred in gathering, separating, dehydrating, and compressing gas (Plaintiff’s Brief in Support of Motion for Summary Disposition, p 4). The trial court in the present case ruled on the following types of costs: “post-production costs necessary to render the raw product marketable and saleable as gas,” including severance taxes and privilege fees; and costs incurred in saltwater disposal and gathering, separating, dehydrating, and compressing gas. Trial Court Order, pp 3-4.

To the extent that the lower court did not address all issues that the parties properly raised below, and with regard to issues left unresolved by the trial court’s decision in *North Michigan*,

supra, we remand for a determination of these issues. See generally *Newark Morning Ledger Co v Saginaw Co Sheriff*, 204 Mich App 215, 224; 514 NW2d 213 (1994) (remand required for insufficient factual findings). We note that any issues that could have been raised but were not raised in the 1983 action are barred under the doctrine of res judicata. *Dart v Dart*, 460 Mich 573, 586-587; 597 NW2d 82 (1999).

Affirmed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Harold Hood

/s/ Peter D. O'Connell